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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMERIGON INC., a Michigan corporation,

Plaintiff,

v.

W.E.T. AUTOMOTIVE SYSTEMS LTD., an Ontario corporation,

Defendant.

Case No. CV09-08466 RGK (RCx)

Hon. R. Gary Klausner

W.E.T.'S NOTICE OF MOTION AND MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION OR IMPROPER VENUE, OR IN THE ALTERNATIVE, TO TRANSFER TO THE EASTERN DISTRICT OF MICHIGAN; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Declaration of Robert Klein filed and [Proposed] Order lodged herewith]

Date: March 8, 2010
Time: 9:00 a.m.
Courtroom: 850

PLEASE TAKE NOTICE that on March 8, 2010, at 9:00 a.m. or as soon thereafter as counsel may be heard, in Courtroom 850 of the United States District Court for the Central District of California, located at 255 E. Temple Street, Los Angeles, CA, before the Honorable R. Gary Klausner, Defendant W.E.T. Automotive Systems Ltd. ("W.E.T."), by and through Counsel, will move for an Order dismissing this case or transfer it to the Eastern District of Michigan.

This Motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Robert Klein filed concurrently herewith, all matters of which the Court may properly take judicial notice, and all other oral and documentary evidence which may be presented prior to or at the hearing on the Motion.

WHEREFORE for the reasons stated and as explained more fully within the concurrently filed Brief request this Honorable Court for an Order dismissing Plaintiff's Complaint for lack of personal jurisdiction or improper venue, or in the alternative, to transfer venue to the Eastern District of Michigan.

Dated: February 7, 2010

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I. INTRODUCTION

This is a patent case in which Plaintiff Amerigon, Inc. ("Amerigon") alleges that W.E.T. is infringing four patents. Amerigon filed its Complaint in this Court even though W.E.T. has no contacts with California, none of the activity/products relating to the asserted patents occurred in California, no relevant W.E.T. documents are known to be located in California, and no W.E.T. witnesses reside in California. Simply put, this Court has no connection with either the parties or the facts of this case.

The truth of the matter is that Amerigon should have filed this case in the Eastern District of Michigan, where W.E.T. appropriately, contemporaneously with this motion, has filed a countersuit for patent infringement. Both companies have their corporate headquarters within fifty miles of that Michigan Court. All of the significant activity relating to this litigation took place and currently is taking place in that forum and the vast majority of the necessary witnesses reside in that forum.

Accordingly, W.E.T. requests that the Complaint be dismissed for lack of personal jurisdiction and improper venue pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(3) or, alternatively, that venue be transferred to the Eastern District of Michigan under 28 U.S.C. §§1404 and 1406.

II. BACKGROUND

W.E.T. is an Ontario corporation with its headquarters and principal business operations in Windsor, Ontario, Canada. Declaration of Robert Klein ("Klein Dec."), ¶ 3. W.E.T.'s Windsor headquarters is located only eleven miles from the United States District Court for the Eastern District of Michigan in Detroit, Michigan. Klein Dec. ¶ 4. W.E.T. designs and sells heating systems and accessories for automobile seats. Klein Dec. ¶ 5. W.E.T.'s systems then are installed by W.E.T.'s customers into assembled seats, and then in turn are sold by W.E.T.'s customers to automobile manufacturers. From the information available

to W.E.T., it appears that Amerigon's Complaint concerns W.E.T.'s heating and cooling technology for automobile seats that is more commonly known as "ActiveCools.™" The conception, design, and development of ActiveCools™ took place in Canada and Michigan. Klein Dec. ¶ 6. W.E.T. worked with Johnson Controls, Inc. ("JCI"), located in Plymouth and Holland, Michigan, in the design and development of ActiveCools™. JCI assisted in the development of an air distribution system, which is part of the overall system engineered independently by W.E.T., the overall system including cooling and blowing systems. Klein Dec. ¶ 7. W.E.T. has only sold ActiveCools™ to JCI and is in negotiations with a second customer, Lear Corporation, which is located in Southfield, Michigan. Klein Dec. ¶ 9. Through JCI, ActiveCools™ seating has been placed in only one line of automobiles, which is manufactured by General Motors Corporation in Michigan. Klein Dec. ¶ 10. However, Lear Corporation is a second potential customer. The specific General Motors' products that utilize ActiveCools™ are GMC's Acadia, Buick Enclave, and Chevrolet Traverse), which are now assembled at GM's Lansing, Michigan facility in Delta Township, Michigan, which itself is located within 100 miles of the U.S. District Court for the Eastern District of Michigan. Klein Dec. ¶ 10.

W.E.T. has no offices in California, has not registered to do business in California, has not appointed an agent for service of process in California, has no telephone listings or mailing addresses in California, has not developed, manufactured, stored, or sold its products in California, has not initiated any lawsuits in California, has no employees in California, does not own any real property in California, has never advertised or marketed its products in California, and does not hold any bank accounts in California. Klein Dec. ¶ 11. Although W.E.T. maintains a website on the Internet that provides information about its services, its website is passive. Klein Dec. ¶ 12. W.E.T. does not offer any

services or goods through its website, and customers cannot order from its website. Klein Dec. ¶ 12.

Amerigon's only apparent connection to California is a small design office located in Irwindale, California and the physical location of its current counsel. However, Amerigon's World Headquarters and principal business operations are in Northville, Michigan, which lies within the U.S. District Court for the Eastern District of Michigan. Klein Dec. ¶ 13. Indeed, similar to W.E.T., Amerigon's customers are located in Michigan. For these reasons, fundamental due process requirements do not allow Amerigon to assert personal jurisdiction over W.E.T. in this judicial district under these circumstances.

Moreover, even if personal jurisdiction is proper, venue is not. Thus, at a minimum, this case should be transferred to Detroit where the parties themselves, the products, and the relevant customers are all located (i.e. either within or 100 miles from the U.S. District Court for the Eastern District of Michigan).

III. ARGUMENT

A. This Court Does Not Have Personal Jurisdiction Over W.E.T.

The U.S. Court of Appeals for the Federal Circuit's precedent controls on the issue of personal jurisdiction in patent cases. *See 3D Sys., Inc. v. Aarotech Labs., Inc.*, 160 F.3d 1373, 1377 (Fed. Cir. 1998). The Federal Circuit has held that whether an exercise of personal jurisdiction satisfies due process in a patent case depends on three factors: (1) whether the defendant "purposefully directed" its activities at residents of the forum; (2) whether the claim "arises out of or relates to" the defendant's activities with the forum; and (3) whether assertion of personal jurisdiction is "reasonable and fair"." *Silent Drive, Inc. v. Strong Indus., Inc.*, 326 F.3d 1194, 1202 (Fed. Cir. 2003). Because the long-arm statute in California extends to the limits of due process, *see* Cal. Civ. P. Code §410.10; *see also Fireman's Fund Ins. Co. v. National Bank of Coops.*, 103 F.3d 888, 893 (9th Cir. 1997), these prongs merge into a due process analysis. Due Process requires that

in order to subject a foreign defendant to jurisdiction in a forum state, the defendant must "have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co.v. Washington,* 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940)). Moreover, these contacts must be "purposeful," so that non-residents have fair warning that a particular activity may subject them to litigation within the forum. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472-74 (1985); *World- Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980) (minimum contacts found only where the defendant "purposefully avails itself of the privilege of conducting activities within the forum State" such that it "should reasonably anticipate being haled into court there.")

Notably, only if Amerigon meets its burden as to the first two prongs, the burden then shifts to W.E.T. to show "a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Breckenridge Pharm, Inc. v. Metabolite Labs, Inc.*, 444 F.3d 1356, 1361-62 (Fed. Cir. 2006) (quoting *Burger King*, 471 U.S. at 476-77). Amerigon does not meet its burden on either of the first two prongs.

W.E.T. has not purposefully directed its activities at residents of California and Amerigon's claim does not arise out of or relate to W.E.T.'s activities in California. In other words, insufficient minimum contacts exist between W.E.T. and California as required by due process for personal jurisdiction.

W.E.T. has no contacts with California whatsoever. It has no offices in California, has not registered to do business in California, has not appointed an agent for service of process in California, has no telephone listings or mailing addresses in California, has not developed, manufactured, stored, or sold its products in California, has not initiated any lawsuits in California, has no employees in California, does not own any real property in California, has not advertised or marketed its products in California, and does not hold any bank

accounts in California. Klein Declaration, *passim*.

None of the activities relevant to this lawsuit occurred in California. The design and development of ActiveCools™ took place in Ontario, Canada and Michigan. W.E.T.'s customers for the ActiveCools™ product are all located in Michigan, and the automobiles in which they have been placed are manufactured/assembled in Michigan. Significantly, W.E.T. only markets its systems to Michigan automobile seat manufacturers such as JCI and Lear. Those manufacturers incorporate the systems into finished seats, which they in turn sell to the automobile manufacturers. Klein Dec. ¶ 8.

Thus, because W.E.T. has not purposefully directed its activities at residents of California and because Amerigon's claim does not the arise out of or relate to W.E.T.'s activities in California, W.E.T. does not have the requisite minimum contacts with the State of California, or this judicial district in particular, Amerigon's Complaint should be dismissed under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction.

B. Alternatively, Amerigon's Complaint Should Be Dismissed for Improper Venue or Venue Should be Transferred to the Eastern District of Michigan

1. Venue In This District is Improper and this Case Should be Dismissed or Transferred.

Alternatively to dismissing this case for a lack of personal jurisdiction, pursuant to 28 U.S.C. §1406, this Court should dismiss this case or transfer it to the Eastern District of Michigan in the interests of justice for improper venue.

Section 1406 provides, in relevant part:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S.C. §1406(a).[1]

28 U.S.C. §1400(b) is the exclusive venue statute for patent infringement claims. *See VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579-80 (Fed. Cir. 1990). To establish venue under 28 U.S.C. §1400(b), a plaintiff must show either that: 1) the defendant resides in the district or 2) has a "regular and established place of business" within that district *and* has committed an infringing act within the District. *Id.* Amerigon cannot show that W.E.T. meets either of these two very specific requirements of Title 28 and thus venue here is improper.

First, W.E.T. does not reside within California, let alone the Central District of California. Residency under Section 1400(b) is defined by the corporate defendant venue provision of 28 U.S.C. §1391(c). *Id.* at 1578. Accordingly, under Section 1400(b), "a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." 28 U.S.C. § 1391(c). W.E.T. is an Ontario corporation with its principal place of business in Canada. Therefore, venue in this district is not proper. Amerigon has not, and cannot, claim that venue is proper based on the residency prong of Section 1400(b). *See* Complaint, ¶2 (asserting that venue is proper because "W.E.T. conducts business throughout the United States, including in this Judicial District, and has committed the acts complained of in this Judicial District and elsewhere.").

Second, W.E.T. does not have a "regular and established place of business" in this judicial district or California in general, nor has W.E.T. committed an infringing act in California. "[I]n determining whether a corporate defendant has a regular and established place of business in a district, the appropriate inquiry is

[1] This Court may also transfer venue to the E.D. Mich. regardless of whether it has personal jurisdiction over W.E.T. *See* 28 U.S.C. §1631 (permitting the transfer of cases when jurisdiction is lacking).

whether the corporate defendant does its business in that district through a permanent and continuous presence there." *In re Cordis Corp.*, 769 F.2d 733, 737 (Fed. Cir. 1985). Here, again, W.E.T. has no offices, employees, or property in the entire State of California. It has no business in California, much less a "regular and established place of business" as required by Section 1400.

Because Amerigon cannot satisfy the "regular and established place of business" requirement, it cannot establish venue under the second prong of 1400(b) as a matter of law**,** and thus it is not even necessary for the Court to consider the further requirement that W.E.T. must have committed infringing acts within this District. But it has not in any event—W.E.T. has not committed any acts of infringement in California because it has not made, used, offered to sell, or sold any allegedly infringing product in California. W.E.T. only sells products to its customer in Michigan. Therefore, venue in this District is improper and the case should be dismissed.

2. Alternatively, this Case Should be Transferred to the Eastern District of Michigan.

28 U.S.C. §1406 authorizes this Court to transfer a case that has been brought in an improper venue if it is "in the interests of justice" that the case be transferred to a venue in which the case "could have been brought." Even if venue is proper, however, the Court can still transfer the case to another venue "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. §1404(a). This case should be transferred under either provision.

After granting mandamus in no less than *four* cases in the past 14 months regarding wrongly-denied motions to transfer, when the chosen district had no connection to the evidence or witnesses, the Federal Circuit had made its position clear:

> **This Court has held and holds again in this instance that in a case featuring most witnesses and evidence**

> **closer to the transferee venue with few or no convenience factors favoring the venue chosen by the plaintiff, the trial court should grant a motion to transfer.**

In re Nintendo Co., 2009 U.S. App. LEXIS 27647, at *6 (Fed. Cir. Dec. 17, 2009); *see also In re Hoffman-La Roche Inc.*, Misc. No. 911, U.S. App. LEXIS 26244 (Fed. Cir. Dec. 2, 2009); *In re TS Tech USA Corp.*, 551 F.3d 1315, 1319 (Fed. Cir. 2008); *In re Genentech, Inc.*, 566 F.3d 1338, 1342 (Fed. Cir. 2009).

Those exact circumstances exist here. When of all the relevant factors are considered, the Eastern District of Michigan is beyond doubt the most appropriate and convenient forum in which to litigate this case, and the case should be transferred.[2]

In deciding whether to transfer a case, whether under Section 1404(a) or 1406, the Court considers factors affecting the private interests of the litigants and the interests of the public. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947) (overruled for other reasons); *see, e.g. Bentz v. Recile*, 778 F.2d 1026, 1027-28 (5th Cir. 1985) ("sections 1404(a) and section 1406(a) employ an 'interest of justice' standard"). Unlike the personal jurisdiction analysis, which looks to Federal Circuit law in patent cases, the law of the regional circuit governs the determination of venue; in this case, the Ninth Circuit. *See Storage Tech. Corp. v. Cisco Sys., Inc.*, 329 F.3d 823, 836 (Fed. Cir. 2003).

The Ninth Circuit has held that in deciding whether transfer is appropriate, this Court must "balance the preference accorded to Plaintiff's choice of forum

[2] As a threshold matter, to the extent any viable claim for relief is set for in Amerigon's complaint, there can be no dispute that this case could have been brought in the E.D. Mich. Given the significant contacts that both parties have with Michigan, including the relevant consumers, the E.D. Mich. would also clearly have personal jurisdiction over W.E.T. and Amerigon. *See* 28 U.S.C. §§1391(c), 1406, and 1400(b); Klein Dec., *passim* (describing sufficient minimum contacts in Michigan).

with the burden of litigating in an inconvenient forum." *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). In doing so, the Court should consider the following private and public interest factors:

> (1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof.

Jones v. GNC Franchising, Inc., 211 F.3d 495, 498-99 (9th Cir. 2000).

a. The Relevant Activity Took Place in Michigan.

This patent action will involve the comparison of the claims set forth in the patents-in-suit to the accused product – believed to be W.E.T.'s ActiveCools™ products currently being sold to General Motors. W.E.T.'s conception, design, development, manufacturing, and sales of its ActiveCools™ is relevant. *All* of these activities took place primarily in Michigan, and some in Windsor, Canada; *none* of them occurred in California. *See* Klein Dec. ¶ 6. Even the automobiles in which the ActiveCools™ were placed are manufactured/assembled in Delta Township, Michigan, a location near the E.D. Mich. Klein Dec. ¶ 10. Given these facts, this factors weighs heavily in favor of transferring this case to the E.D. Mich.

b. Both California and Michigan are Equally Familiar with Patent Law.

The second factor, which requires the Court to consider if either state is more familiar with the applicable law, is neutral in this case because alleged patent infringement, a claim arising under federal law, is the only claim at issue. Thus, since the E.D. Mich. and this Court are no doubt equally familiar with patent law

and Amerigon's complaint does not contain any state claims implicating California state law, the factor is neutral. If anything, given its location in the heart of the domestic automobile industry, the court in the Eastern District of Michigan has extensive familiar with the customs, practice, and workings of that industry, which would be of benefit to both parties in this case.

c. Plaintiff's Choice of Forum is Afforded Little Weight In These Circumstances.

The Ninth Circuit has held that, "[i]f the operative facts have not occurred within the forum of original selection and that forum has no particular interest in the parties or the subject matter, the plaintiff's choice is entitled only to minimal consideration." *Pacific Car & Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968); *see also Inherent.com v. Martindale-Hubbell*, 420 F. Supp.2d 1093, 1100 (N.D.Cal. 2006) ("the degree to which courts defer to plaintiff's chosen venue is substantially reduced when the plaintiff's choice is not its residence.") (internal quotes omitted). Here, none of the operative facts have occurred within this district and neither party has any connection to this district. Notably, it is just the opposite—Amerigon is a Michigan corporation with its headquarters and principal place of business located in the E.D. Mich. The fact that Amerigon chose this judicial district, perhaps only out of convenience for its own legal counsel, is afforded little weight.

d. The Parties Have Minimal Contacts With This District and Many with the E.D. of Michigan.

Factors four and five require the Court to consider each parties' contacts with the forums, and particularly, those contacts relating to the plaintiff's cause of action. W.E.T. has no contacts with this judicial district or California. Amerigon's only contact with California is a small office located in Irwindale, California, and outside counsel located in California. There is no connection between this lawsuit and this district.

In sharp contrast, both W.E.T. and Amerigon have numerous contacts with the E.D. Mich. that are directly relevant to this case. The conception, design, and development of ActiveCools™ took place in Michigan and nearby Windsor. *See* Klein Dec. ¶ 6. All of the sales of ActiveCools™ have taken place in Michigan. Klein Dec. ¶ 9. Third parties that have participated in the design and development of ActiveCools™ are located in Michigan. Klein Dec. ¶ 6-7. W.E.T.'s customers for ActiveCools™ are located in Michigan. Klein Dec. ¶ 9. Further, Amerigon's world headquarters are in Michigan and the negotiations between the parties regarding this case have occurred in Michigan. Klein Dec. ¶ 13, 16. Finally, Amerigon is in the same business as W.E.T. and deals with the same market participants, in Michigan.

e. Litigating in this Court Would Be More Expensive for Both Parties than Litigating in Michigan.

Litigating this case in California would require extensive travel and expense for both parties that would not be required were the case in Michigan. Since W.E.T. is located in Ontario, Canada and Amerigon is a Michigan corporation also located in Michigan, and most relevant third parties (i.e. the relevant third party customers and their documents) are located in Michigan, all witnesses would have to travel to California for hearings and trial. That would not be the case if the case were in Detroit.

Moreover, Amerigon's California attorneys themselves will have to travel to Michigan or Canada for all depositions, those of both parties and relevant third parties, regardless of where the case is. And since all relevant documents are in Michigan and Canada, those attorneys will likely have to do extensive traveling to Michigan to review documents as well. W.E.T's counsel in Chicago, Washington, and Detroit are much closer to Detroit than California. Thus, expense of counsel is less if the case is in Detroit.

In sum, the expense for both parties would be far less if this case were litigated in Detroit.

f. All Relevant Witnesses, Third Parties, and Documents are Located in Michigan and Canada.

Factors seven and eight require the Court to consider the availability of compulsory process to compel attendance of unwilling non-party witnesses, and the ease of access to sources of proof. Most of the witnesses, both party witnesses and third parties, are located in Canada or Michigan. Under Fed. R. Civ. P. 45(b)(2)(B), a third party cannot be compelled to travel more than 100 miles to attend a hearing or trial. If this case were to be litigated in California, many relevant third party witnesses – individuals from JCI, Lear Corporation, and General Motors — could not be compelled to attend trial. Moreover, Ninth Circuit district courts have held that Rule 45 does not even permit service of subpoena on a party officer outside a 100-mile radius. *Iorio v. Allianz Life Ins. Co.*, 2009 U.S. Dist. LEXIS 97617, at*12 (S.D. Cal. Oct. 21, 2009) (quashing subpoenas served on party officers outside Court's 100-mile radius); *Dolezal v. Fritch*, 2009 U.S. Dist. LEXIS 26238, at *6 (D. Ariz. March 23, 2009) (refusing to hold contempt hearing for party officers' failure to appear because subpoena was served outside the Court's 100-mile radius). Therefore, if this were litigated in California, neither party could even compel the attendance of the other party's officers. *See* 9-45 Moore's Federal Practice – Civil §45.02[4][a] (2009) (absent a subpoena or pretrial order, there is no obligation that a party attend a trial).

In contrast, both the relevant third parties and the officers of both parties could be compelled to attend a trial in the E.D. Mich. Moreover, since all relevant documents are located in Michigan and Windsor, they will be much more accessible to the litigators if this case were tried in the E.D. Mich. rather than California.

Based on all the above factors, and particularly because this Court lacks *any* connection to the issues in this case and *all* relevant witnesses and documents are located in Michigan or nearby Windsor, this case should be transferred to the E.D. Mich. *See, e.g., In re Nintendo Co.*, 2009 U.S. App. LEXIS 27647 at *6 ("in a case featuring most witnesses and evidence closer to the transferee venue with few or no convenience factors favoring the venue chosen by the plaintiff, the trial court should grant a motion to transfer").

IV. CONCLUSION

For all these reasons, the Court should dismiss this case or transfer it to the Eastern District of Michigan.

Dated: February 7, 2010

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